No. 15632

# In the United States
# Court of Appeals
## For the Ninth Circuit

THOMAS CHARLES STEVENS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

## BRIEF FOR THE UNITED STATES

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## OPINION BELOW

The judgment of the District Court was rendered without an opinion.

## JURISDICTION

On September 6, 1956, a one count Indictment was returned against the appellant in the United States District Court for the District of Idaho, charging the defendant with a violation of the White Slave Traffic Act, 18 USC 2422. (R. 1)[1] Jurisdiction was conferred on the District Court by 18 USC 3231 and 18 USC 3237. After a jury trial, appellant was found guilty as charged. (R. 27) A sentence of four years was imposed and judgment entered on May 25, 1957. (R. 3) Notice of appeal was filed on May 29, 1957. (R. 35) The jurisdiction of this court is invoked under 28 USC 1291.

## STATUTES INVOLVED

18 U. S. C.:

> "SEC. 2422. COERCION OR ENTICEMENT OF FEMALE
>
> Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the

1/ References preceded by "R." are to the Transcript of Record; references preceded by "Tr." are to the Transcript of proceedings upon trial.

part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5000 or imprisoned not more than five years, or both."

## STATEMENT OF THE CASE

Appellant's statement of the case (Br. 2-6) is inadequate and incomplete in many respects and argumentative. Accordingly, the Government submits the following summary of the evidence and record:

The Indictment charges appellant with on or about April 9, 1956, persuading, inducing, and enticing a woman to go from San Francisco, California to Wallace, Idaho for the purpose of prostitution, debauchery, and other immoral purposes, and thereby knowingly causing her to be transported as a passenger upon the line of a common carrier in interstate commerce. On May 9, 1957, the appellant filed a Motion for Bill of Particulars. (R. 17-18) Thereafter, the appellee voluntarily disclosed to the attorney for the appellant that the name of the woman persuaded, induced, and enticed to go from San Francisco, California to Wallace, Idaho was the appellant's wife, Mrs. T. C. Stevens, who was also known by other names, and who will be referred to herein as Sharon Stevens,

2/ and that the name of the common carrier on which she traveled was United Air Lines from San Francisco, California to Spokane, Washington, via Boise, Idaho. (R. 21) After a hearing, the court denied the Motion, except as to those things which appellee offered to furnish. (R. 19)

Upon application of the appellee (R. 7) on November 9, 1956 that appellant's wife, Sharon Stevens, was a material witness, the court thereafter, on November 13, 1956, entered an order and issued a warrant for the arrest of Sharon Stevens as a material witness. (R. 9-11) She was thereafter admitted to bail on November 16, 1956 for her appearance as a witness at the trial. (R. 12-13) Her bail was continued until the completion of the trial.

Other pre-trial Motions were made and Orders entered, none of which, however, are pertinent to the issues presented in the appeal.

## SUMMARY OF THE EVIDENCE

The evidence to support the verdict may be summarized briefly as follows:

On the afternoon of April 9, 1956, the defendant's wife, Sharon Stevens, departed San Francisco, California for Spokane, Washington, on United Air Lines flight 373. The United Air Lines official called by the prosecution testified that she booked passage as Mrs. T. C. Stevens, and produced company records consisting of a passenger list (Ex. 1) and the originial flight coupon (Ex. 2) showing the flight. Sharon Stevens also testified that she was a

2/ Not to be confused with another witness, Kay Stevens, appellant's former common law wife.

passenger on this flight on that date. Upon her arrival in Spokane, Washington, she registered at the Davenport Hotel, where she spent the night of April 9, 1956. (Ex. 3, Tr. 19) She checked out of the hotel at 7:35 a.m., April 10, 1956, (Tr. 22) and proceeded to Wallace, Idaho by bus. (Tr. 47) Although no passenger lists are maintained by bus companies, a former official of the Auto-Interurban Company, which provided bus service between Spokane, Washington and Wallace, Idaho on April 10, 1956, testified that the company was a common carrier of passengers and had three scheduled trips each day. (Ex. 7, Tr. 27) He also testified that the Greyhound Line operated bus service between Spokane, Washington and Wallace, Idaho, and had several schedules during the day. (Tr. 27-28)

Upon arrival at Wallace, Idaho, Sharon Stevens proceeded to the Oasis Rooms, a house of prostitution, (Tr. 48) operated by Peggy Montague. (Tr. 34) On the date of her arrival in Wallace, Idaho, she appeared at the police station, where she was fingerprinted and registered as a prostitute. (Ex. 8, Tr. 32-33). Sharon commenced working as a prostitute at the Oasis Rooms on the evening of April 10, 1956, (Tr. 51) and was the only girl working at the house on that occasion. (Tr. 55) During that same evenning she was interviewed by Special Agents Alfred J. Gunn and Joseph J. Pieper, of the Federal Bureau of Investigation. After a short time, she admitted her true identity and advised them that the story she had given to that point was not completely true. She then advised them that she would give them the full story, and told them of her relationship with the appellant, her activities as a prostitute, and the

names of various individuals for whom she had worked. (Tr. 126, 143) During the interview, Special Agent Pieper wrote down in note form the story related by the appellant's wife. (Tr. 126, Ex. 11) At the conclusion of the interview of Sharon Stevens by Special Agents Gunn and Pieper, she seemed very cooperative, and agreed to keep their Bureau informed of her whereabouts. (Tr. 127, 146) She voluntarily signed the note stating that she freely made the statement and initialed each page and the corrections thereon after Special Agent Pieper related its contents to her. (Tr. 127) After a few days, Sharon Stevens left the Oasis Rooms and returned to the appellant in San Francisco. During the short period she worked at the Oasis Rooms she maintained a record of the amount of money she received in her work. (Ex. 15, Tr. 53-54)

Sharon Stevens was called as a Government witness, and was also the only witness called by appellant in defense of the charges set forth in the Indictment. On direct examination by counsel for the Government, she testified freely as to facts pertaining to her trip from San Francisco to Wallace, and to other matters concerning her work as a prostitute. Her testimony was so framed that appellant was in no way implicated with her activities. When her prior statement was used for purposes of refreshing her recollection, she denied making such statements and then categorically denied that there was anything at all correct in the statement. (Tr. 83) She did state that when she was in Wallace she told appellant what she was doing and advised him of the amount of money she was making, but denied that she sent him any money at that time. (Tr. 59-60)

In the court's discretion, the prosecution's witness, Sharon Stevens, was declared a reluctant and hostile witness (Tr. 84) after specifically denying making prior statements pertaining to the appellant and herself and advising that there was hardly anything in the statement that was correct. (Tr. 80-84)

On cross examination by the appellant, Sharon Stevens denied that her husband had anything to do with her ever being a prostitute and repeatedly urged her to stop engaging in it; that her trip to Sacramento was without his knowledge, and that he had nothing whatever to do with her coming to Wallace, Idaho, and in fact discouraged her going; that he did not furnish her any of the money for the trip, and indicated he might not be there when she got back; that he did not share in any of her income, but that he did drive her to the airport at the time she left. (Tr. 89-91) With respect to the statement made to Special Agents Pieper and Gunn, she advised that she didn't think there were two words of truth in it, and particularly if there was anything in the statement to indicate that the appellant had anything to do with persuading her to go from San Francisco, California to Wallace, Idaho for the purpose of prostitution that it was a lie. (Tr. 99)

On redirect examination by the Government, Sharon Stevens admitted that she had been living with her husband since she left Wallace; that she has discussed the case with him; that she had talked to Mr. Hamilton, the appellant's attorney about the case, and that she had been on bail as a material witness for the Government pending the trial of the case. (Tr. 101-102) She also stated that she and her husband

were in Miles City, Montana in August or September 1955, when she worked as a prostitute in a house of prostitution by the name of Nelda's. (Tr. 110)

After reaffirmance by the court of its ruling declaring Sharon Stevens a hostile witness to the appellee (Tr. 118), she was recalled to the stand for further cross examination. When questioned by counsel for the appellant concerning the inconsistencies of her former statement with her testimony, she claimed that she had difficulty reading the notes as they were illegible. (Tr. 120-121) Exhibit No. 11 was then admitted in evidence over the objection of the appellant that it was incompetent, immaterial, irrelevant, and hearsay as to the defendant, which was, however, limited by the statement of appellant's counsel that the "illegibility of the original notes was the issue." (Tr. 131)

The defense was a repetition of the denial by Sharon Stevens of any participation by the appellant in her transportation from California to Idaho for the purposes of prostitution, as charged in the Indictment, going to Wallace, Idaho to work as a prostitute, giving her any money for the ticket (Tr. 187), and again denied that she had given a true statement to the investigators in Wallace, Idaho. (Tr. 189)

On appellant's direct examination, she testified that when she was in Montana she went to work at Nelda's in Miles City. On cross examination, she advised that she and the appellant went together from Billings to Miles City because he was offered a job there, and because of her loneliness she started working at Nelda's. (Tr. 190)

She claimed that he knew of this employment after they left Miles City. (Tr. 193-194) At this time she was 17 years of age. (Tr. 195) With respect to the memorandum made on a calling card (Ex. 9), she reiterated her statement that a prostitute friend by the name of Vickie with whom she worked at Sacramento was the one who wrote the information down, and denied the truth of her statement to the FBI agents that she memorized it and her husband wrote it down when he came after her. (Tr. 199-200) She again denied the truth of statements to the agents implicating her husband and reiterated that he only drove her down to buy the ticket and out to the airport to take the plane, but did not provide her with any money or give her any instructions concerning what to do when she arrived at Spokane, Washington or Wallace, Idaho. (Tr. 200, 202-203) She further testified that all of the time she has been living with her husband, when employed, he worked as a part-time cook, tended bar, or gambled. (Tr. 203).

Ethel Barrett testified for the prosecution that she operated a house of prostitution in Sacramento, California, known as The Ranch, during the early part of 1956. She identified Sharon Stevens as a girl known to her as Jean Summers, who worked as a prostitute at The Ranch during the latter part of March 1956. (Tr. 38-41). The witness stated that she returned to The Ranch on March 30, 1956, at which time Sharon left The Ranch. (Tr. 39) Ten days later Sharon traveled from San Francisco to Wallace to work at the Oasis Rooms. It was at The Ranch that Sharon learned of the possibilities of working at the Oasis Rooms in Wallace, Idaho.

(Tr. 48) She claimed it was there that her friend, Vickie, a prostitute with whom she worked, told her about Wallace and wrote the notations on a calling card, "Peggy, Wallace, 1-4041." (Tr. 50, Ex. 9) "Peggy" referred to Peggy Montague, the operator of the Oasis Rooms; "Wallace" referred to Wallace, Idaho; and "1-4041" referred to the telephone number of the Oasis Rooms. (Tr. 45, 50, Ex. 18)

Kathy Morgan, called by the prosecution, testified that she met appellant, whom she knew as Steve, in San Francisco during the last of 1955 or the first part of 1956. She testified that she met him at the Red Robin Cocktail Lounge, where she was employed as a waitress. (Tr. 166-167) She testified that he was in the cocktail lounge every day during the daytime and never mentioned what type of work, if any, he was engaged in. (Tr. 168) She was a prostitute (Tr. 172), and just before the birth of her baby on March 6, 1956 (Tr. 169) appellant asked her if she knew where he could find some "trick shorts" for his wife. (Tr. 168-169) She described "trick shorts" as being the kind of clothes that prostitutes work in. Sharon Stevens, known to the witness as Jean, was not present at the time appellant asked for these "trick shorts." They were given to her at a later time when he brought Sharon to the bar and from the bar Kathy and Sharon went together to her apartment located near the bar. (Tr. 169) She also testified that sometime after she met appellant, he mentioned to her that he was going to see his wife, who she imagined was out of town, although he never stated. At the time he asked her for the "trick shorts," the witness recalled the conversation as being:

"Do you know where I can get some shorts for Jean? She's going out of town."

"I said that I had some and if he wanted them, he could have them. He had given me the stroller and I thought it would be nice to give them to him." (Tr. 171)

A former common-law wife of the appellant, Kay Stevens, testified for the prosecution that they had lived together from 1952 until about August of 1955. Sharon Stevens, known to her only as Sharon, lived at the same motel in Salt Lake City. The appellant and Kay Stevens moved from Salt Lake City to Billings, Montana in 1955, and lived together there until August or September of 1955, when she found him gone one day when she returned from work. (Tr. 176) During the time the appellant and Kay Stevens lived together he mentioned to her that prostitution was a good way to make money and asked her to become a prostitute, which she refused. (Tr. 178) After appellant left Kay Stevens in Billings, Montana in August or September of 1955, he telephoned her from San Francisco on several occasions, and early in December 1955 had a conversation with her over the telephone advising her that if she were interested in becoming a prostitute to go to Nelda's in Miles City, a house of prostitution, and gave her the impression that if she mentioned his name that would fix it for her. (Tr. 178-179)

At the close of the Government's case, appellant moved for a directed verdict of acquittal on the grounds that the evidence presented by the Government, considered in the most favorable light, would be insufficient to sustain a verdict of guilty. The

motion was denied. (Tr. 183-184)

At the completion of the charge, the court excused the jury to entertain exceptions. None were taken. (Tr. 222)

Following the verdict of guilty, appellant filed a motion in arrest of judgment on the grounds that the Indictment did not state facts sufficient to constitute an offense against the United States, and the conviction was not supported by the evidence. (R. 28) The motion was denied. (Tr. 228) Judgment was then entered and appellant was sentenced to serve a term of four years in an institution designated by the Attorney General of the United States. (Tr. 229)

## ARGUMENT

### I

### THERE WAS SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT A CONVICTION

It is not for the court to weigh the evidence or to determine the credibility of witnesses. The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *Glasser* v. *United States*, 315 US 60, 80. The evidence is uncontroverted that appellant drove his wife to a downtown air line ticket office in San Francisco on the day of her departure to purchase her ticket, and that he later drove her to the airport for her departure. At the airport he was the recipient of an insurance policy purchased by his wife and naming him the beneficiary. The evidence is uncontroverted that appellant's wife

worked as a prostitute on a call girl basis in San Francisco, California, and in a house of prostitution at Sacramento, California, within the weeks and months preceding her travel to Wallace, Idaho. The record is clear that her trip to Wallace, Idaho was for the specific purpose of working as a prostitute at the Oasis Rooms in Wallace, Idaho, and that she did engage as a prostitute at that house upon her arrival. Her flight from San Francisco to Wallace was supported by competent airline records; her arrival in and departure from Spokane, Washington was supported by competent hotel records; to show that her trip from Spokane, Washington to Wallace, Idaho could, as she testified it was, be made by interstate motor bus service, competent bus schedules were admitted into evidence; and her registration as a prostitute with the Police Department in Wallace, Idaho was supported by competent police records.

In support of the jury's verdict that appellant was instrumental in his wife making this trip, there was competent evidence in the record to show that a month or so prior to her departure appellant requested and received a "trick suit" for the use of his wife, from Kathy Morgan, a prostitute. There was also competent evidence to show that within approximately four months prior to Sharon's departure from San Francisco, appellant suggested to his former common-law wife, Kay Stevens, that she become a prostitute, and advising her that if she would go to Nelda's in Miles City, Montana, she would be accepted if she were to only mention appellant's name. The jury was also at liberty to consider testimony showing that appellant had no apparent steady employment, and was known by one of the

bellhops in San Francisco, California, who placed calls for his wife, and often saw them together at a bar near one of the hotels, where calls were placed for her.

In a prosecution under the White Slave Traffic Act, where there were controverted questions of fact before the jury, if there was evidence from which the required intent could be fairly and reasonably found, the judgment should be affirmed. *Talbot* v. *United States*, 286 F. 21, (CA7, 1922).

## II

## THE COURT IN ITS DISCRETION PROPERLY DECLARED APPELLANT'S WIFE A HOSTILE WITNESS, PERMITTING HER IMPEACHMENT.

Appellant contends that there was no legal basis for declaring appellant's wife a hostile witness on the ground that the Government could not claim surprise. (Br. 10) In support of this contention, appellant alleges that the Government failed to make inquiry as to what her testimony would be before calling her to the stand. This being so, he argues that the Government could not request the court to exercise its discretion in declaring her a hostile witness, nor invoke the rule permitting impeachment of its own witness.

The law is well settled that, upon proper representation by counsel for the Government that a witness is reluctant or hostile, the court may in its discretion declare the witness hostile and permit the Government to cross examine the witness. *Fields* v. *United States*, 164 F. 2d 97, cert. den. 332 US 851,

rehearing denied 333 US 839 (CCA DC); *United States* v. *Goldstein*, 135 F. 2d 359 (CCA 2, 1943); *Gariepy* v. *United States*, 189 F. 2d 459 (CCA Mich.) The court did not abuse its discretion.

The strict rule at common law has long since been relaxed to permit the impeachment of a party's own witness in the case of surprise by his testimony. *United States* v. *Graham*, 102 F. 2d 436, cert. den. 307 US 643, rehearing denied 308 US 632 (CA 2, 1939) or of a witness whom the Government is under a legal duty or obligation to call, *Meeks* v. *United States*, 179 F. 2d 319 (CA9, 1950). She was the one who first discussed the matter with the Federal Bureau of Investigation agents, and was the only person other than appellant who under the circumstances had knowledge of the true facts surrounding her transportation from San Francisco, California to Wallace, Idaho. The fact that she was also the wife of appellant and resided with him continuously to the time of trial did not relieve the Government of the obligation to call her since her testimony was competent. *Caminetti* v. *United States*, 242 US 470; *United States* v. *Bozeman*, 236 Fed. 432.

Furthermore, the Government was justified in believing that the statement she made to the investigators was the truth, and she appeared friendly and cooperative. Consequently, counsel for the Government was privileged to believe that when called as a witness at the trial to testify under oath, she would tell what the attorney believed to be the truth. The court was well justified in accepting the assurance of surprise. *United States* v. *Graham*, supra, at page 442. The Government had a right to anticipate that, under oath and in court, she would testify in accord-

ance with her story to the Federal Bureau of Investigation. *Weaver* v. *United States*, 216 F. 2d. 23, 25 (CA9, 1954).

The showing of reluctance to testify, hostility, a witness whom the Government was obligated to call and surprise, all appearing to the court, it was within its sound discretion to permit impeachment of the witness by the showing of previous contradictory statements. *Weaver* v. *United States*, supra. A witness whose past equivocations disclose an unwillingness to speak the truth may be prodded by questioning her as to her earlier declarations, even though incidentally they come to some extent before the jury. *United States* v. *Freundlich*, 95 F. 2d 376, 379, (CA2, 1938).

The admissibility of the notes constituting the memorandum of the prior statement made by the witness will be discussed hereafter.

## III

## INTENT, PURPOSE AND MOTIVE OF APPELLANT MAY BE PROVED BY CONDUCT WITHIN A REASONABLE TIME OF THE OFFENSE.

The necessary intent, purpose and motive on the part of an accused in violation of the White Slave Traffic Act may be proved by circumstantial evidence. And as bearing upon that essential element of the offense, the conduct of the parties within a reasonable time before and after the transportation may be taken into consideration. *Dunn* v. *United States*, 190 F. 2d 496, 498; *Lindsey* v. *United States*, 227 F. 2d 113. See also *Tedesco* v. *United States*,

118 F. 2d 737 (CA9, 1941). Appellant contends that activities of appellant's wife, not having been connected to the appellant and being too remote in time, allegedly from one to two years prior to the offense, were erroneously admitted in evidence.

Concerning his wife's turning out as a prostitute at Nelda's, in Miles City, Montana, this occurred, according to her testimony, in August or September of 1955, or approximately seven or eight months prior to April 9, 1956, the date of the violation under which appellant stands convicted. She testified that appellant was in Miles City at that time. (Tr. 111) It was this same house of prostitution that appellant a few months later, in December 1955, to which appellant suggested to his former wife, Kay Stevens, that she proceed in order to become a prostitute.

With respect to her employment as a prostitute at The Ranch, in Sacramento, California, the evidence was clear that she was still living with her husband and that she departed from this house on March 30, 1956, or approximately ten days before she departed from San Francisco to Wallace, Idaho.

Appellee contends that these events occurred well within a reasonable period of time from the date of the offense charged and were clearly admissible to show purpose, intent and motive of appellant.

## IV

## THE COURT DID NOT ERR IN RULING ON THE ADMISSIBILITY OF EVIDENCE.

The appellant contends that Exhibit 4 is irrelevant and thus inadmissible, and that Exhibit 9 was here-

say and irrelevant and likewise inadmissible. No claim was made by appellant that their admission was prejudicial to appellant, and no grounds urged in support thereof. Assuming, arguendo, that they were irrelevant and inadmissible, the error, if any, in admitting them was harmless.

Appellant's principal ground of contention that prejudicial error was committed was directed to the admission of Exhibit 11. (Br. 10, 14) Appellant contends that this exhibit, which consisted of notes taken by the Federal Bureau of Investigation agents at the time appellant's wife was interviewed, which at the time was acknowledged by her, was admitted as substantive evidence rather than limited to purposes of impeachment. Appellant's brazen contention that the calling of appellant's wife by the Government as its witness was a ruse or device by which, under the impeachment doctrine, it could obtain the admission of inadmissible evidence as substantive evidence is completely lacking in merit.

The unique position of this witness and the circumstances surrounding the admission of Exhibit 11 must be kept in mind. The fact that she was properly subject to impeachment has been discussed hereinbefore. In addition to being the Government's principal witness, whom it was obliged to call, Sharon Stevens was the only witness appellant relied upon in defense of the charges set forth in the Indictment. Exhibit 11 was first used by the Government in an attempt to refresh the recollection of the witness. When this failed as to the questions and former statements implicating her husband, the appellant, and only then after cross examination by appellant's counsel in which she denied that there

was any truth at all in the statement, and even later after further cross examination by appellant's counsel to the effect that her memory could not be refreshed by the notes because they were illegible, was the exhibit admitted in evidence. The prior statement made by the witness was used further to impeach her by counsel for the Government when cross examining her as a witness for appellant. This action was clearly proper, and it was admissible since it contradicted and was inconsistent with the witness's testimony. *Weaver* v. *United States,* supra; *Meeks* v. *United States*, supra.; *Duarte* v. *United States,* 171 F. 2d 971 (CA5, 1949). The trial court permitted the introduction of Exhibit 11 solely upon the question of her credibility, and not as substantive evidence, and so charged the jury. (Tr. 213)

Considering the demeanor of the witness in the instant case, the comment of the court in *United States* v. *Freundlich,* supra, with respect to advising the jury is very much in point:

> " * * * There is always a chance that his answers may betray not only that he said what the minutes report, but that it was true. As it is true of most that takes place in a trial, the right result is a matter of degree, and depends upon the sense of measure of the judge. Perhaps it was safer to have told the jury to disregard this answer; but we cannot think that, considering the vacillation of this witness, it would have been an error to let it stand."

The admission of the former statement of appellant's wife can be sustained on grounds independent

of whether or not it was limited to purposes of impeachment.

Although a woman who enters interstate commerce for the purpose of prostitution does not commit an offense against the United States. *Dodson* v. *United States*, 215 F. 2d 196, she is considered an accomplice and her testimony is admissible in prosecutions under the White Slave Traffic Act. *Caminetti* v. *United States*, supra.

In *American Fur Company* v. *United States*, 2 Pet. 358, 364, 7 L. Ed. 450, the United States Supreme Court said:

> "Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the res gestae, may be given in evidence against the others." (See also *St. Clair* v. *United States*, 154 US 134, 149.)

The statement of an accomplice is within the exception to the hearsay rule and is admissible although it was made out of the defendant's presence. *Ladrey* v. *United States*, 155 F. 2d 417 (CA, DC, 1946). The true test in reference to the reliability of the declaration is not whether it was made ante litem motam, as is the case with reference to some classes of hearsay evidence, but whether the declaration was uttered under circumstances justifying the conclusion that there was no probable motive to falsify. 20 Am. Jur. 468, Evidence §556.

The Government also contends that the prior state-

ment of appellant's wife is admissible for consideration by the jury as substantive evidence under the reasoning of *Di Carlo* v. *United States*, 6 F. 2d 364, 368 (CA 2, 1925). In that case, Judge Learned Hand said:

> "The latitude to be allowed in the examination of a witness, who has been called and proves recalcitrant, is wholly within the discretion of the trial judge. Nothing is more unfair than to confine a party under such circumstances to neutral questions. Not only may the questions extend to cross-examination, but, if necessary to bring out the truth, it is entirely proper to inquire of such a witness whether he has not made contradictory statements at other times. He is present before the jury, and they may gather the truth from his whole conduct and bearing, even if it be in respect of contradictory answers he may have made at other times * * * The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court."

The Court of Appeals for the Second Circuit has followed this decision in the subsequent cases of *United States* v. *Graham*, supra; *United States* v.

*Block*, 88 F. 2d 618, 620; and see particularly *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 932 (1957).

The *Di Carlo* decision has been recognized by this court in *Craig* v. *United States*, 81 F. 2d 816 (1936); and in *Lindsey v. United States*, 237 F. 2d 893 (1956), where the court, at page 895, stated:

> "There is scant basis in reason or experience to admit such statements, except in cases where it affirmatively appears that the prior consistent statement was made at a time when the declarant had no motive to fabricate. Only then can such evidence be considered as having any reliable element of trustworthiness."

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

Respectfully Submitted.

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By

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